STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v	No. 247133 Wayne Circuit Court
TYSON DAVID O'NEAL, Defendant-Appellant.	LC No. 02-010195-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of thirty-six to eighty years in prison for the second-degree murder conviction and twenty-eight months to five years in prison for the felon in possession conviction, to be served consecutive to two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion by excluding the statement of defendant's accomplice, Parish Hickman, that he got away with murder by framing defendant. We find that the statement was erroneously excluded, but that the error was harmless.

We review the trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). On September 10, 2001, defense counsel received a letter dated September 2, 2001, from a Wayne County Jail inmate stating that Hickman admitted framing defendant. Counsel did not notify the prosecution about this information until two weeks before trial, and did not reveal any details regarding the letter to the prosecutor until the day before trial. The trial court refused to allow defense counsel to confront Hickman with this statement at trial. The court reasoned that by failing to specifically inform the prosecutor about the information, defense counsel denied him the opportunity to investigate. Defendant claims this was error because the prosecutor did not request the information, and defense counsel did notify the prosecutor about the information.

The purpose of discovery is to "'promote the fullest possible presentations [sic] of the facts [and] minimize opportunities for falsification of evidence.'" *People v Valeck,* 223 Mich App 48, 51-52; 566 NW2d 26, (1997), quoting *People v Wimberly,* 384 Mich 62, 66; 179 NW2d

623 (1970). MCR 6.201 governs discovery in criminal cases. MCR 6.201(A) provides that certain disclosures are required if requested by the opposing party. "If a party fails to comply with [MCR 6.201], the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy." MCR 6.201(J). Had a discovery order been granted in the instant case, the court would likely have had discretion to exclude Hickman's statement. However, our review of the lower court record does not indicate that the prosecutor requested discovery or that discovery was granted to the prosecutor. Because there was no order requiring discovery to the prosecutor, defendant was not obligated to reveal the statement to the prosecutor.

Nevertheless, erroneous exclusion of evidence does not warrant reversal unless the exclusion was inconsistent with substantial justice or resulted in a miscarriage of justice. MCR 2.613(A); MCL 769.26. Stated differently, the error "requires reversal only if it is prejudicial." *People v Crawford*, 458 Mich 376, 399; 582 NW2d 785 (1998), citing *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Whether prejudice has occurred is determined by the nature of the error and the weight of the untainted evidence. *Crawford, supra* at 399-400. Because the exclusion of the statement arguably affected defendant's right to confront witnesses, we review this as preserved constitutional error. Const 1963, art 1, § 20; US Const, Am VI. "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Where four people testified that Hickman was on the driver's side of the car when the passenger emerged from the other side with a gun, and three people identified defendant as the passenger and shooter, we find beyond a reasonable doubt that a rational jury would have found defendant guilty even if defendant had been permitted to confront Hickman with the alleged statement. Thus, we find the exclusion of the statement harmless.

Defendant next argues that the trial court abused its discretion in precluding testimony regarding a statement made by the victim while in the hospital. We disagree.

An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). "The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). According to MRE 801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as provided by these rules." MRE 802. Defendant attempted to admit the statement pursuant to MRE 804(b)(7), which provides for the admission of a statement not specifically covered by any other exception if the statement is trustworthy, is evidence of a material fact, and is more probative than any other evidence that can be procured through reasonable efforts, where its admission will best serve the general purpose of the rules and the interests of justice.

The trial court found that the statement did not have the guarantees of trustworthiness because the victim was probably highly medicated when he made the statement. Because the victim had been shot and was likely medicated at the hospital, because four people testified at trial that Hickman was on the driver's side of the car when the passenger door opened and the passenger emerged with a gun, and because three people identified defendant as the passenger

and shooter, we conclude that the trial court was justified in concluding that Shelby's statement was untrustworthy. *Ullah, supra* at 673. Therefore, the trial court did not abuse its discretion.

Defendant next argues that the prosecutor committed misconduct by injecting issues broader than guilt or innocence in his closing argument. We disagree.

"Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Defendant failed to challenge the comments made by the prosecutor during his closing argument and, therefore, has failed to preserve this issue for review. We will only review defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial." *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' . . . Further, prosecutors are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001), quoting *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

Here, the prosecutor stated the following:

> As I spent this past weekend preparing my closing, I kind of hit a slump. Didn't know what quite to say and I'm sitting at my computer at my desk. A little music is playing just to try to clear my head, clear my mind. And realizing that at 32 I've done just a few too many of these cases.
>
> But as I'm doing that, I kind of stopped writing and started playing on the computer . . . .
>
> And a song comes on my computer, my real player. And the words kind of strike me because I hadn't noticed the song before . . . . And the words were, there is no substitute for the truth. Either it is or it isn't. And you know the truth by the way it feels . . . .

Defendant claims that the prosecutor was attempting to divert the jury from its duty to decide the case on the evidence. We disagree and find that the prosecutor's comment regarding his personal situation was merely a segue into his discussion regarding truth and witness credibility, which are appropriate arguments. We therefore conclude that, in context, the prosecutor's remarks were proper. Furthermore, any prejudice that may have resulted from these comments could have been cured by a timely instruction; therefore, reversal is not warranted. *Schutte, supra* at 721. Moreover, any prejudice was cured when the jury was instructed that the attorneys' comments and arguments were not evidence and were only meant to help it understand the evidence and each party's theory of the case. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), citing *Bahoda, supra* at 281.

Defendant next argues that the prosecutor improperly commented regarding the honesty of his witness' during his closing argument. We disagree.

Because this issue was also unpreserved, it accordingly is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. However, it is not improper for a prosecutor to comment on a witness' credibility during closing arguments or to suggest a witness is telling the truth. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). The prosecutor here did not imply that he had special knowledge that the witnesses were testifying truthfully but, rather, commented that the witnesses in this case – who all claimed that defendant was the gunman – had no reason to lie because they did not personally know defendant or Hickman. It was not improper for the prosecutor to comment on the witness' credibility in this way. *Stacy, supra* at 36-37. Because the prosecutor's comments were proper, they did not constitute a plain error affecting defendant's substantial rights.[1]

Defendant next argues that his trial counsel was ineffective for failing to move to preclude details surrounding defendant's prior conviction and for failing to request a new jury panel when the prior conviction was disclosed to the jury. We disagree.

Defendant did not move for a new trial or a *Ginther*[2] hearing before the trial court; thus, we must review this issue on the basis of the existing record. *Rodriguez, supra* at 38, citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's findings of fact are reviewed for clear error." *Id.* at 579. "Questions of constitutional law are reviewed . . . de novo." *Id*. At the beginning of voir dire, the trial court read to the prospective jurors the information regarding the charges alleged in this case. It stated the following:

> And count three alleges that the same date, time, and location . . . , that the defendant, Tyson O'Neal, did use a firearm when ineligible to do so because he had been convicted of manslaughter, a specified felony, and the requirements for regaining eligibility had not been met, contrary to the laws of the State of Michigan.

The trial court further instructed the jury that an information is presented in every criminal trial and that it must not be considered as evidence of guilt. Defendant did not challenge the manslaughter reference during the reading of the information. On the second day of trial, however, defense counsel and the prosecutor stipulated that defendant was previously convicted of an unspecified felony, and he had not met the eligibility requirements to carry a weapon in

[1] Defendant also argues that his trial counsel was ineffective for failing to challenge the prosecutorial misconduct. Because we conclude that the prosecutor did not commit misconduct, counsel was not required to raise a futile objection.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)

Michigan. Defendant now claims that defense counsel was ineffective for failing to request a stipulation before voir dire.

To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *Smith*, *supra* at 556, citing *Strickland v Washington*, 466 US 668, 688-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland*, *supra* at 689-694.

We conclude that defendant has failed to overcome the presumption that defense counsel's assistance constituted sound trial strategy. Defense counsel may not have thought it necessary to stipulate to the felony conviction until trial because the reading of the information is not considered evidence, and the jury was so instructed. Defense counsel's trial strategy may have been to ignore the reference to manslaughter after it was made to minimize any prejudicial effect this reference may have had. In any event, defendant has not shown it was reasonably probable that the results would have been different had the manslaughter conviction not been mentioned. The manslaughter conviction was only mentioned once during the reading of the information, and the trial court instructed the jury that the information was not evidence of guilt. Further, sufficient evidence was presented at trial from which a rational jury could convict defendant without the reference. Four people testified that they saw defendant get out of the passenger side of Hickman's car with a firearm and then heard gunshots, and three people identified defendant as the passenger and shooter at a police line-up; Hickman testified that he supplied the firearm and drove the car, but that defendant was the shooter. Defendant has failed to overcome the presumption that he received effective assistance of counsel at trial.

Defendant next argues that his trial counsel was ineffective for failing to move for a mistrial or request a cautionary instruction when Hickman mentioned his polygraph examination at trial. We disagree.

During cross-examination, defense counsel asked Hickman if he had to lie and place the blame on defendant to cut a deal with the prosecution. Hickman responded that he did not lie and that he took a polygraph test. Defendant now claims that that this statement amounted to an admission that Hickman passed a polygraph test, which is inadmissible.

The Supreme Court of Michigan has held that "testimony concerning the result of a polygraph examination is not admissible at trial." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *People v Barbara*, 400 Mich 352, 377; 255 NW2d 171 (1977). References to a polygraph examination, however, do not always constitute error requiring reversal. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000), citing *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). This Court has set forth the following factors to determine if reversal is required when references to polygraph examinations are made:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated

> references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Rocha, supra* at 9.]

Because the reference was inadvertent, brief, and did not involve polygraph examination results, defense counsel may have thought it more harmful than helpful to object to the reference. Defendant has failed to overcome a strong presumption that counsel's failure to object constituted sound trial strategy. *Stanaway, supra* at 687-688. Furthermore, defendant has failed to show that a reasonable probability exists that the outcome of the proceedings would have been different had the polygraph examination references been excluded. *Id.*

Defendant next argues that his trial counsel was ineffective for failing to call an eyewitness identification expert or request an instruction regarding the unreliability of eyewitness identification. We disagree.

Defense counsel's decisions regarding jury instructions are presumed to be matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Here, Hickman was the only eyewitness who actually claimed to see defendant shoot the rifle. While the trial court did not specifically instruct regarding eyewitness testimony, it did give an instruction regarding accomplice testimony. This instruction accomplished the same goal as an eyewitness identification instruction would have, which is to warn the jury about the unreliability of the testimony. Defense counsel may not have requested an eyewitness identification instruction to avoid redundancy. Defendant has failed to overcome the presumption that counsel's assistance constituted sound trial strategy. *Stanaway, supra* at 687. Furthermore, defendant has failed show that he was prejudiced by defense counsel's failure to request an eyewitness instruction because the accomplice instruction sufficiently warned the jury about the unreliability of Hickman's testimony.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens